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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. POR YE HER, Defendant and Appellant.	C058443 (Super. Ct. No. 03F02335)

Convicted of murder and attempted murder, defendant Por Ye Her appeals, contending the trial court erred in instructing the jury on voluntary manslaughter and voluntary attempted manslaughter and his trial attorney was ineffective in failing to object to certain evidence and argument. Finding no prejudicial error or ineffective assistance of counsel, we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On an evening in March 2003, defendant and his brother, Chang Her, were at a dance club on Fruitridge Road when Chang got into an argument outside the club with Lou Saephan. The

argument ended without a fight, but afterwards Chang and defendant were both very upset. A friend of Saephan's named Keng Thao came out of the club and insisted on talking to the Her brothers to prevent a fight. Defendant pushed Thao in the face, and Thao fell over a chair and on to the ground. Chang and defendant began to leave, when two other brothers, Sua and Chue Moua -- one of whom was Thao's best friend -- came out of the club. Chue asked Chang, "Do you want a piece of me?" and hit Chang in the face. Sua then went after defendant.

Two men pulled Sua and defendant apart, then turned to help break up the fight between Chang and Chue, when there was a gunshot. This shot struck Sua in the left temple. Defendant then approached Chue, pointed a gun at his head, and shot him. Chue suffered a gunshot wound through his face. Defendant then pursued Thao and, after saying, "You want to talk shit to me?" shot him in the back. Defendant then fled.

Thao died as a result of internal injuries from the bullet that entered his back.

Defendant was charged with one count of murder and two counts of attempted murder with related firearm enhancements. In addition to the charged crimes, the jury was instructed on the lesser included offenses of voluntary manslaughter and attempted voluntary manslaughter, as well as self-defense and defense of another.

The jury found defendant guilty of all three offenses as charged and found the enhancement allegations true. The trial

court sentenced him to a term of 9 years 4 months, plus 100 years to life, in prison.

DISCUSSION

I

Voluntary Manslaughter And The Malice Element Of Murder

A

Jury Instructions

Defendant contends he was "denied a fair trial on the issue of malice" -- an element of murder -- because the jury instructions (drawn from CALCRIM) "failed to identify absence of provocation and absence of imperfect defense as elements of murder and attempted murder." We are not persuaded.

"California statutes have long separated criminal homicide into two classes, the greater offense of murder and the lesser included offense of manslaughter. The distinguishing feature is that murder includes, but manslaughter lacks, the element of malice." (*People v. Rios* (2000) 23 Cal.4th 450, 460.) "Generally, the intent to unlawfully kill constitutes malice. [Citations.] 'But a defendant who intentionally and unlawfully kills lacks malice . . . in limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" [citation], or when the defendant kills in "unreasonable self-defense" -- the unreasonable but good faith belief in having to act in self-defense [citations].' [Citation.] Because heat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter *by negating the element of malice* that

otherwise inheres in such a homicide [citation], voluntary manslaughter of these two forms is considered a lesser necessarily included offense of intentional murder [citation]." (*People v. Breverman* (1998) 19 Cal.4th 142, 153-154.)

In a murder case where there is substantial evidence the defendant may have acted in the heat of passion or unreasonable self-defense, the jury must be instructed on those two types of voluntary manslaughter as lesser included offenses of murder. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 159-160.) Furthermore, "If the issue of provocation or imperfect self-defense is . . . 'properly presented' in a murder case [citation], the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice." (*People v. Rios*, *supra*, 23 Cal.4th at p. 462.)

Defendant faults the CALCRIM homicide instructions the court gave here because they do not expressly identify the absence of provocation and imperfect self-defense as an element of the crime of murder, or at least as a subelement of the element of malice.[1] Instead, the instructions inform the jury that "[p]rovocation . . . may reduce a murder to manslaughter" (CALCRIM No. 522), and "[a] killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant

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[1] Defendant's arguments also apply to the crime of attempted murder and the lesser included offense of attempted voluntary manslaughter.

killed someone because of a sudden quarrel or in the heat of passion" or "because he acted in imperfect self-defense or imperfect defense of another" (CALCRIM Nos. 570 and 571). In defendant's view, "Absent *a finding of murder*, there is nothing to 'reduce'" and therefore "[t]he CALCRIM formulation suggests jurors must first determine whether the defendant committed murder, based on an incomplete explanation of malice; only then *might* they *lower* the crime to manslaughter, based on additional findings. This approach is affirmatively misleading."

We find no merit in this argument. The CALCRIM instructions given here do not suggest the jury has to first make "*a finding of murder*," as defendant contends, before the jury can consider voluntary manslaughter as a lesser offense. Indeed, the instructions on voluntary manslaughter -- CALCRIM Nos. 570 (heat of passion) and 571 (imperfect self-defense) -- affirmatively explain that "[a] killing that would *otherwise* be murder is reduced to voluntary manslaughter" if the People fail to meet their burden of proving the defendant did not kill in the heat of passion or was not acting in imperfect self-defense or imperfect defense of another. The word "otherwise" clearly conveys that the crime can be murder only if it is not voluntary manslaughter. Thus, the instructions do not tell the jury to first determine whether the defendant committed murder before considering whether the crime was voluntary manslaughter instead.

Furthermore, to the extent defendant can be understood to argue that the CALCRIM instructions do not explain to the jury

that heat of passion and imperfect self-defense operate by negating the element of malice,[2] this court has concluded already that such an explanation is not required. (*People v. Genovese* (2008) 168 Cal.App.4th 817, 830-831 ["the CALCRIM instructions are not erroneous in their failure to tell the jury the role that malice (or lack of malice) plays in reducing murder to voluntary manslaughter"].)

Defendant next faults the instructions on jury deliberations and completion of verdict forms the trial court gave. He complains that "[t]hese instructions did not cure the initial error" because "none explained that absence of passion/quarrel and absence of imperfect defense were prerequisites to murder and attempted murder verdicts." He also complains that the instructions told the jury "consideration of lesser offenses was not required" and "if jurors agreed on guilt of the charged crime, no further deliberation was necessary." In defendant's view, following these instructions "the jury reasonably could conclude it had discretion to reach verdicts on the charged crimes without considering the law or evidence relating to voluntary manslaughter."

Again, we find no merit in defendant's arguments. First, we do not find any "initial error" that the instructions on jury deliberations and completion of verdict forms had to "cure." As

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[2] We glean this argument from his assertion that "[t]he CALCRIM formulation" includes "an incomplete explanation of malice."

we have explained, the voluntary manslaughter instructions the court gave properly told the jury that if the People failed to meet their burden of proving the defendant did not kill in the heat of passion or was not acting in imperfect self-defense or imperfect defense of another, then what otherwise would have been murder was instead voluntary manslaughter.

Second, the statement, "You may consider these different kinds of homicide in whatever order you wish," does not -- as defendant contends -- tell the jury "consideration of lesser offenses [i]s not required." It merely tells the jurors they may choose *in which order* they consider the various kinds of homicide at issue in the case.

Third, contrary to defendant's assertion, the instructions did not tell the jurors that if they agreed on guilt of the charged crime, no further deliberation was necessary. What the instructions did was give them a suggested order for completing the verdict forms. ("I am going to explain how to complete the verdict forms using one order, but you may choose the order to use.") The instructions did not tell them how to deliberate on the various charges or when "no further deliberation was necessary."

In summary, we find no reason to believe the jury instructions led the jury to understand it could convict defendant of murder (or attempted murder) without ever considering whether the crime was voluntary manslaughter (or attempted voluntary manslaughter) instead.

Because we conclude the jury instructions were not flawed in the manner defendant argues, we need not address his claim regarding the prosecutor's closing argument, to the extent that claim rests on the premise that "the instructions as a whole were . . . ambiguous." We must, however, consider his claim that his trial attorney was ineffective for failing to object to the prosecutor's closing argument.

B

The Verdict Ladder

At the end of his rebuttal argument, the prosecutor showed the jury a "verdict ladder" on an overhead projector, as follows:

First Degree Murder

(Use of Firearm Enhancement)

Second Degree Murder

(Use of Firearm Enhancement)

Voluntary Manslaughter

(Use of Firearm Enhancement)

Involuntary Manslaughter

Referencing this "ladder," he told the jury, "you can't get to voluntary manslaughter until you've convicted [*sic*] on both murder one and murder two, right? That means all 12 of you have to agree he didn't commit a willful, deliberate, and premeditated murder before you can start thinking about second-degree murder, and the same is true of Counts 2 and 3. . . . [¶] . . . [Y]ou can't get to the lowers until you've convicted [*sic*] of the lessers."

Defendant contends the prosecutor's argument was misconduct because the prosecutor incorrectly told the jurors they had to deliberate on the crimes in a certain order. (See, e.g., *People v. Kurtzman* (1988) 46 Cal.3d 322, 324-325 [a trial court may "restrict[] a jury from *returning a verdict* on a lesser included offense before acquitting on a greater offense" but may not "preclude a jury from *considering* lesser offenses during its deliberations"].)

We agree the prosecutor misstated the law in his argument, but even assuming defense counsel fell below an objective standard of reasonableness in not objecting to the prosecutor's erroneous argument, defendant has not shown a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. (See *People v. Maury* (2003) 30 Cal.4th 342, 389.) Defendant's prejudice argument rests not only on the prosecutor's erroneous argument, but also on his assertion -- which we have rejected already -- that the jury instructions were "misleading." On the contrary, as we have observed, the instructions told the jurors they could "consider these different kinds of homicide in whatever order you wish." The court instructed the jury that if the attorneys' comments on the law conflicted with the court's instructions, the jury had to follow the instructions. We must presume the jury followed the court's instructions rather than the conflicting argument from the prosecutor. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

II

Imperfect Self-Defense

Defendant alleges prejudicial error in a discrepancy between the CALCRIM instruction on imperfect self-defense relating to an actual killing (voluntary manslaughter) (CALCRIM No. 571) and the CALCRIM instruction on imperfect self-defense relating to an attempted killing (attempted voluntary manslaughter) (CALCRIM No. 604). The former instruction told the jury that "[t]he defendant acted in imperfect self-defense or imperfect defense of another if: [¶] 1. The defendant actually believed that he or Chang Her was in imminent danger of being killed or suffering great bodily injury, and; [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger, but; [¶] 3. At least one of those beliefs was unreasonable." The latter instruction told the jury that "[t]he defendant acted in imperfect self-defense or imperfect defense of another if: [¶] . . . [¶] 3. The defendant believed that he or Chang Her was in imminent danger of being killed or suffering great bodily injury, and; [¶] 4. The defendant believed that the immediate use of deadly force was necessary to defend against the danger, but; [¶] 5. The defendant's beliefs were unreasonable."

Defendant correctly observes that the voluntary manslaughter instruction tells the jury that imperfect self-defense exists if either of the defendant's two beliefs was unreasonable, while the attempted voluntary manslaughter

instruction tells the jury that imperfect self-defense exists only if *both* of the defendant's beliefs were unreasonable.

The formulation in the voluntary manslaughter instruction is the correct one. "For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Where, as in the CALCRIM instructions, the "belie[f] in the need to defend" is described as *two* beliefs -- (1) the belief in imminent danger of death or great bodily injury and (2) the belief in the need to use deadly force to defend against that danger -- the unreasonableness of *either* belief would be sufficient to transform perfect self-defense into imperfect self-defense. Thus, the requirement in the attempted voluntary manslaughter instruction that "[t]he defendant's *beliefs* were unreasonable" is incorrect.

Defendant is incorrect, however, in arguing that the erroneous instruction was prejudicial to him. For this aspect of the instruction on attempted voluntary manslaughter by reason of imperfect self-defense to have come into play in the jury's deliberations, the jury first would have had to conclude that defendant *actually* believed in the need to defend himself or Chang, or -- more accurately -- the jury would have had to entertain a reasonable doubt about whether defendant actually

believed in the need to defend himself or his brother. Had the jury reached that point, however, the choice that remained would not have been between attempted murder and attempted voluntary manslaughter, as defendant contends. Rather, the choice would have been between attempted voluntary manslaughter and acquittal based on perfect self-defense. The fact that the jury convicted defendant of attempted murder means that it concluded defendant did not actually believe in the need to defend himself or his brother, and therefore the reasonableness of such a belief -- or of the two component beliefs that made up the belief in the need to defend -- was never an issue. Accordingly, the error in the instructions was harmless beyond a reasonable doubt.

III

Provocation

Defendant contends that the prosecutor's argument regarding heat of passion was erroneous. We disagree.

"An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' [citation], and is thus voluntary manslaughter [citation], if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an '"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment."'" (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.) "The focus is on the provocation--the surrounding circumstances--and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to

the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion." (*People v. Najera* (2006) 138 Cal.App.4th 212, 223.)

Here, in his rebuttal argument, the prosecutor posed a hypothetical situation in which a man kills a drunk driver upon discovering that the driver has just run over the man's daughter. The prosecutor argued this was "an adequate provocation" because "[i]t isn't because you talked shit to me. You don't get to kill someone because you think they talked shit to you. You don't, and that was the provocation here. It's about as slight a mode of provocation as you can get, the fact that he thought Keng Thao had talked shit to him." The prosecutor then argued, "You don't get to set up your own standard. . . . It's got to be no, that anyone in the same situation would have been provoked by what happened. There isn't anyone, given the description Adam Wade gave you, who would think that Keng Thao was behaving in a way that required that he have a bullet in his back through his heart."

In defendant's view, the foregoing argument was erroneous because the prosecutor was framing the issue for the jury as "whether a reasonable person *would have killed* Thao and *would have attempted to kill* the Mouas." He further argues that "[t]he court was bound to 'disabuse' the jury of that notion and erred in failing to discharge its duty." He also argues that it was ineffective assistance of counsel for his trial attorney not to object to the prosecutor's argument.

We disagree. The instructions the trial court gave correctly told the jury that as a result of the provocation, defendant must have "acted irrationally and under the influence of intense emotion that obscured his reasoning or judgment and" "[t]he provocation would have caused a person of average disposition to act [rashly] and without due deliberation; that is, from passion rather than judgment." The court also properly told the jury as follows: "It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked, and whether the provocation was sufficient. [¶] In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked, and how such a person would react in the same situation knowing the same facts." To the extent the prosecutor's argument may have deviated from these instructions, "The trial court correctly instructed the jury to follow the court's instructions, not the attorneys' description of the law, to the extent there was a conflict. We presume the jury followed that instruction." (*People v. Najera*, *supra*, 138 Cal.App.4th at p. 224.) Thus, any error in the prosecutor's argument was not prejudicial.

IV

Extraneous Gun Evidence

Defendant contends his trial attorney was ineffective for failing to object to evidence that, following the shooting, police found a .22-caliber rifle and .22-caliber ammunition in

defendant's apartment and car trunk. He contends the extraneous gun evidence was irrelevant since the weapon used in the shooting was a .25-caliber handgun, and the extraneous gun evidence was overly prejudicial because it suggested his bad character.

The People contend defense counsel had a tactical reason for not objecting to the extraneous gun evidence because "it provided him an argument that the gun used in the shootings must have belonged to someone else besides" defendant. Defense counsel did emphasize in closing argument that the evidence of the .22-caliber rifle and ammunition did not have "any connection with this case" because the shells found at the scene of the shooting were .25-caliber. It seems unlikely, however, that defense counsel intentionally refrained from objecting to the extraneous gun evidence just so he could make this argument. If he had successfully objected to the evidence, he could just as easily have argued that "there [wa]s nothing at [the apartment] that has any connection with this case."

Nevertheless, even assuming defense counsel fell below an objective standard of reasonableness in not objecting to the extraneous gun evidence, defendant has not shown a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. (See *People v. Maury*, *supra*, 30 Cal.4th at p. 389.) In defendant's view, "a juror could determine that given the nature of defendant's arming at home, he was someone who would likely be armed when out in public and would tend to act aggressively and violently

in a confrontation." While this is not outside the realm of possibility, defendant fails to persuade us that it was reasonably probable the extraneous gun evidence is what made the difference here. Thus, we cannot find ineffective assistance of counsel in failing to object to that evidence.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.